BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TONEKO KAYZER	)	
Claimant	)	
VS.	)	
	)	Docket No. 264,046
MAUDE CARPENTER CHILDREN'S HOME	)	
Respondent	)	
AND	)	
	)	
SAGAMORE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the March 4, 2002 Award entered by Administrative Law Judge Jon L. Frobish. The Board heard oral argument on August 16, 2002, in Wichita, Kansas.

APPEARANCES

Russell B. Cranmer of Wichita, Kansas, appeared for claimant. Jeffery R. Brewer of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a January 8, 2001 accident and resulting low back injury. Following the accident, claimant returned to work for only one day as her job was eliminated due to financial reasons. Because claimant was able to perform that job without accommodations, the Judge determined claimant's permanent partial general disability was limited to her functional impairment rating. Consequently, the Judge awarded claimant a five percent permanent partial general disability.

Claimant contends Judge Frobish erred. Claimant argues the Judge misinterpreted the law and that the Judge should have followed K.S.A. 44-510e in determining claimant's

permanent disability. Claimant requests the Board to modify the Award and find that she has a 28.3 percent actual wage loss and a 27.3 percent task loss for a 27.8 percent permanent partial general disability.

Conversely, respondent and its insurance carrier argue the Award should be affirmed.

At oral argument before the Board, the parties narrowed the issue for this appeal to the nature and extent of claimant's injury and disability.

FINDINGS OF FACT

After reviewing the entire record, the Board finds, as follows:

1. On January 8, 2001, claimant slipped on a wet floor and injured her low back. The parties stipulated that claimant's accident arose out of and in the course of her employment with respondent. Respondent is a children's home. At the time of the accident, respondent had employed claimant for approximately five and one-half months as a juvenile case worker.

2. Following the accident, claimant sought treatment from her private physician, Dr. Alberto F. Carro. The doctor diagnosed low back sprain and recommended conservative treatment. The doctor first saw claimant for her low back complaints on January 10, 2001, at which time the doctor took claimant off work until January 15, 2001. Dr. Carro released claimant to return as of January 15, 2001, but the doctor restricted her from lifting more than 25 pounds, from repetitive bending and from stooping more than 10 times per day. According to the doctor's progress notes from claimant's January 15, 2001 appointment, at that time the doctor was aware of claimant's impending termination.

3. On January 15, 2001, claimant's first day back to work following the accident, respondent eliminated claimant's job. Consequently, January 15, 2001, was the last day that claimant worked for respondent.

4. After her termination, claimant began looking for other work. Before working for respondent, claimant, who has a bachelor's degree in social work, worked approximately two years as a juvenile probation officer, approximately two to two and one-half years as a correctional officer for the Sedgwick County Youth Program, approximately six months at the Judge Riddell's Boys Ranch, approximately two to two and one-half years at the Boys and Girls Clubs, approximately three months at a grocery store, and approximately two years as a basketball coach. Contacting from three to five potential employers per week, in

September 2001 claimant obtained a community corrections job in Indianapolis, Indiana. In that position, claimant earns nine dollars per hour working 40 hours per week. Consequently, at the time of the regular hearing claimant was earning 28 percent less than the $502.09 she was earning on the date of the accident.

5. At the November 2001 regular hearing, claimant was concerned about losing her community corrections job due to her back injury and was continuing to look for other employment. The Board concludes that claimant had made a good faith effort to find appropriate employment.

6. The medical evidence is uncontradicted that claimant sustained permanent functional impairment due to the January 8, 2001 accident. Dr. Carro rated claimant as having a five percent whole person impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). On the other hand, Dr. Pedro A. Murati, whom claimant's attorney hired to evaluate claimant, examined claimant in May 2001 and found a nine percent whole person functional impairment under the AMA *Guides*. The Board is not persuaded that either rating is more credible than the other and, therefore, averages the ratings and concludes that claimant sustained a seven percent whole person functional impairment as a result of the January 8, 2001 accident.

7. The greater weight of the medical evidence establishes that claimant should observe permanent restrictions due to her low back injury. Although Dr. Carro ultimately released claimant without any work restrictions, he testified that he did not quantify claimant's restrictions as he was not asked and he believed that claimant would self-limit her activities. Dr. Carro testified, in part:

> Q. (Mr. Cranmer) So in this case, you didn't quantify any specific restrictions?
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> A. (Dr. Carro) No.
>
> Q. Because, one, you weren't asked to?
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> A. That's correct, sir.
>
> Q. And, two, you figured she would work within whatever ability she had to do?
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> A. That is correct.[1]

[1] Carro Depo. at 15.

On the other hand, Dr. Murati quantified claimant's restrictions and noted in his report that claimant should not lift, carry, push or pull more than 35 pounds at any time; should limit occasional lifting, carrying, pushing and pulling to 35 pounds; should limit frequent lifting, carrying, pushing and pulling to 20 pounds; should limit constant lifting to 10 pounds; should limit climbing stairs and ladders, bending, squatting and crawling to an occasional basis and should not constantly sit, stand, walk or drive. The doctor also believes claimant should alternate sitting, standing and walking and that claimant should use good body mechanics at all times.

8. As a result of the January 8, 2001 accident claimant lost the ability to perform three of the approximately 16 former work tasks that she performed in the 15-year period before the accident. That conclusion is based upon Dr. Murati's testimony. Claimant did not introduce a written list itemizing her former work tasks but the Board counts 16 tasks that the doctor was asked to consider, three of which the doctor indicated claimant should not now attempt to perform (restraining juveniles from the Sedgwick County Youth Program job, playing football in the Judge Riddell's Boys Ranch job and demonstrating basketball techniques in her coaching job). Consequently, claimant has a 19 percent task loss.

CONCLUSIONS OF LAW

The Award should be modified to grant claimant a seven percent permanent partial general disability from January 8, 2001, through January 15, 2001; a 60 percent permanent partial general disability from January 16, 2001, through August 31, 2001; and a 24 percent permanent partial general disability commencing September 1, 2001.

When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of

> functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[2] and *Copeland*.[3] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[4]

And the Kansas Court of Appeals in *Watson*[5] recently held that the absence of a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that in such circumstances the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's ability to earn wages.

Nonetheless, the Judge determined claimant's permanent partial general disability should be limited to her functional impairment rating as claimant returned to her job for one

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[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] *Id.* at 320.

[5] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

day without accommodations. The Judge did not cite any authority to support that conclusion. Claimant contends the Judge misinterpreted the law. The Board agrees.

In January 1998, the Kansas Court of Appeals decided *Gadberry*.[6] In that decision, the Court of Appeals held that a worker who returned to work at her pre-injury wage but who was terminated within a few weeks in a layoff was not precluded from receiving a work disability (a permanent partial general disability greater than the functional impairment rating). Moreover, the Court of Appeals noted that there was no evidence that the employer was accommodating the worker with a light-duty job.[7] The Court stated, in part:

> Gadberry's return to work at the same wage that she had been receiving prior to her [January 21, 1994] injury does not preclude a finding of wage loss since she was given notice of her termination just a few weeks later, and the termination was based on an economic layoff. Pursuant to *Lee*, Gadberry became eligible for compensation on a work disability upon her termination, one component of which is wage loss.[8]

In addressing whether the principles in *Foulk* should preclude claimant from receiving a work disability, the Court stated:

> Gadberry would have continued to work at Polk if she had not been terminated. The record reflects that Gadberry applied for retirement benefits subsequent to her termination because she needed health insurance. Even after she had applied for retirement benefits, Gadberry sought employment with numerous employers within the community. Gadberry did not refuse employment; it was never offered to her.[9]

Consequently, in *Gadberry* the Court of Appeals held that the worker was entitled to receive a work disability after she was terminated in an economic layoff despite returning to her regular work without accommodations.

In January 2003, the Kansas Court of Appeals in *Cavender*[10] held that a worker who had obtained other employment following a work injury was entitled to receive work

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[6] *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

[7] *Id.* at 804.

[8] *Id.* at 805.

[9] *Id.* at 806.

[10] *Cavender v. PIP Printing, Inc.*, ___ Kan. App. 2d ___, 61 P.3d 101 (2003).

disability benefits after resigning her employment for reasons unrelated to the injury. The Court reasoned that the proper test to apply in these situations is whether the worker has made a good faith effort to find appropriate employment. The Court wrote, in part:

> K.S.A. 44-510e(a) allows work disability in excess of functional impairment only if the claimant is making less than 90% of his or her preinjury gross weekly wage. If this percentage is met, K.S.A. 44-510e(a) provides the equation for computing work disability[.]
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> . . . .
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> The cases interpreting K.S.A. 44-510e have added the requirement that an employee must set forth a good faith effort to secure appropriate employment before work disability will be awarded.
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> The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis. . . .[11]
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> . . . .
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> The purpose of the good faith test, at its very core, is to prevent employees from taking advantage of the workers compensation system. In situations where post-injury workers leave future employment, the good faith test is extended to determine whether leaving was reasonable. Clearly, in the cases cited by PIP [the employer], leaving employment was reasonable when the employment became outside physical restrictions or the changed circumstances justified a refusal of accommodated employment. However, the reasonableness of leaving employment is not limited to a decision based on work restrictions or injuries.
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> The present case is closest in nature, while still not on point, to those cases where an injured employee is terminated due to economic downturn and layoff and the employee is found to still be entitled to work disability. **Those cases present a situation where termination or leaving employment is unrelated to the workers compensation injury or restrictions.** . . .[12]

[11] *Id.* at 103-104 (citations omitted).

[12] *Id.* at 105 (citation omitted) (emphasis added).

And the Kansas Court of Appeals has consistently held that factors other than a worker's injury and permanent medical restrictions may be considered in determining whether a worker has made a good faith effort to find employment.[13]

Respondent and its insurance carrier argue, in effect, that the Board should stray from the plain language of K.S.A. 44-510e in assessing claimant's permanent partial general disability. The Board disagrees.

> The fundamental rule of statutory construction is that the intent of the legislature governs. When the language used is plain, unambiguous, and appropriate to an obvious purpose, the court should follow the intent as expressed by the words used. When construing a statute, a court should give words in common usage their natural and ordinary meaning.[14]

> Although appellate courts will not speculate as to the legislative intent of a plain and unambiguous statute, where the construction of a statute on its face is uncertain, the court may examine the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under various suggested interpretations.[15]

In their briefs to the Board, neither party cited any authority that either supported or challenged the Judge's legal conclusion that claimant's benefits should be limited to the functional impairment rating.

The Board, however, is aware of the *Watkins*[16] decision in which a worker was denied a work disability after returning to work following a work accident and later being terminated due to the company's closure. But the Board has determined in previous claims that *Watkins* does not apply to the present definition of work disability as the Kansas Court of Appeals in *Watkins* interpreted K.S.A. 1992 Supp. 44-510e. In *Watkins*, permanent partial general disability was defined as follows:

> the extent, expressed as a percentage, **to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced,** taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of

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[13] See *Ford v. Landoll Corp.*, 28 Kan. App. 2d 1, 11 P.3d 59, *rev. denied* 269 Kan. ___ (2000).

[14] *Hedrick v. U.S.D. No. 259*, 23 Kan. App. 2d 783, 785, 935 P.2d 1083 (1997) (citations omitted).

[15] *Estate of Soupene v. Lignitz*, 265 Kan. 217, 220, 960 P.2d 205 (1998) (citations omitted).

[16] *Watkins v. Food Barn Stores, Inc.*, 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

> permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.[17]

In direct contrast to measuring a worker's ability to earn a comparable wage and measuring the ability to perform work in the open labor market, the present work disability formula is based upon actual wage loss and the actual number of work tasks that a worker can no longer perform. In short, under the present formula for work disability the worker's ability to perform the job that the worker was doing at the time of the accident is not determinative of whether or not a worker is entitled to receive a work disability.

Unlike the formula for work disability that controlled the *Watkins* decision, the present work disability formula utilizes the loss of work tasks from jobs other than the one that the worker was performing at the time of the accident, as long as those other jobs were performed within 15 years of the accident. More importantly, unlike K.S.A. 1992 Supp. 44-510e, under the present definition of work disability the theoretical loss of ability to earn wages is only considered when, pursuant to *Copeland*, a worker has failed to make a good faith effort to look for appropriate employment.

In *Gadberry*, the Kansas Court of Appeals noted the important distinctions in defining permanent partial general disability under the former and present versions of K.S.A. 44-510e. The Court wrote, in part:

> To arrive at a fair and accurate assessment of the effect of work-related injuries, the Kansas Legislature has, throughout the life of the Workers Compensation Act, considered several compensatory theories. This court reviewed the legislative evolution of the work disability concept in *Lee v. Boeing Co*. Although various formulas have been adopted in an effort to ascertain a fair measurement of a worker's disability, prior to 1993, the formulas were primarily based on the concept of compensation for the loss of *abilities* – the ability to earn wages and/or the ability to perform work. For various reasons, measuring disability compensation by the loss of abilities resulted in concerns about increased litigation and higher insurance premiums. Therefore, in 1993, the Kansas Legislature introduced a new factor into the equation – actual wage loss. The new two-part test for finding and measuring work disability includes both a measurement of the loss of ability to *perform work tasks* and *actual loss of wages* resulting from the worker's disability. . . .[18]

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[17] *Id.* at 838 (emphasis added).

[18] *Gadberry,* 25 Kan. App. 2d at 802-803 (citation omitted).

In the same decision, the *Gadberry* Court noted that the present permanent partial general disability formula in K.S.A. 44-510e provided "an objective determination of wage loss – the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker was earning after the injury" and that the statute did not set forth any exceptions to that mathematical calculation.

Finally, in *Helmstetter*,[19] the Kansas Court of Appeals specifically held that *Watkins* was not applicable to the present definition of work disability. The Court of Appeals stated:

> Further, *Watkins* involved a different definition of work disability. The former version of K.S.A. 44-510e involved an ability test both as to jobs and wages, and *Watkins* is premised on that ability test.[20]

The Board is also aware of the *Newman*[21] decision in which the Kansas Court of Appeals applied *Watkins* to an accident under the present work disability formula. *Newman*, which was first released as an unpublished decision, does not address the major changes in defining permanent partial general disability in the former and present versions of K.S.A. 44-510e. Moreover, *Newman* neither acknowledged that the Kansas legislature had changed the definition of work disability nor that *Helmstetter* had held that *Watkins* does not apply to the present definition of work disability. Accordingly, the *Newman* decision does not address the issue now before the Board in this claim.

According to the above appellate court decisions that are applicable to this claim, the relevant issue is not whether a worker returned to work without accommodations but whether the worker has made a good faith effort to find and retain appropriate employment. If the worker has made a good faith effort to find and retain employment, then the actual difference in the worker's pre- and post-injury earnings should be used in determining work disability. If the worker has not made a good faith effort to find work, then a post-injury wage should be imputed based upon the worker's post-injury ability to earn. Consequently, not all workers who are earning less than 90 percent of their pre-injury wage are entitled to receive a work disability award.

Because claimant has established a good faith effort to find appropriate employment, her actual wage loss should be used for the disability formula. Consequently, as claimant was unemployed until sometime in September 2001 when she found a job in Indiana, a 100 percent wage loss should be used for the wage loss prong of the work

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[19] *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 281, 28 P.3d 398 (2001).

[20] *Id.* at 281.

[21] *Newman v. Kansas Enterprises*, __ Kan. App. 2d __, 42 P.3d 752 (2002).

disability formula for the period from January 16, 2001, to September 1, 2001. (The record does not reflect the actual date that claimant began working in Indiana; therefore, the Board will use September 1, 2001, as that date.) Accordingly, commencing September 1, 2001, claimant's actual wage loss decreases to 28 percent for the work disability formula.

Averaging claimant's 100 percent wage loss with the 19 percent task loss yields a 60 percent permanent partial general disability. Averaging claimant's 28 percent wage loss with the 19 percent task loss yields a 24 percent permanent partial general disability. Accordingly, the March 4, 2002 Award should be modified to grant claimant the following permanent disability benefits:

> A seven percent permanent partial general disability from January 8, 2001, through January 15, 2001.
>
> A 60 percent permanent partial general disability from January 16, 2001, through August 31, 2001.
>
> And a 24 percent permanent partial general disability commencing September 1, 2001.

AWARD

WHEREFORE, the Board modifies the March 4, 2002 Award and increases claimant's permanent partial general disability, as follows:

Toneko Kayzer is granted compensation from Maude Carpenter Children's Home and its insurance carrier for a January 8, 2001 accident and resulting disability. Based on an average weekly wage of $502.09, Ms. Kayzer is entitled to receive the following disability benefits:

For the period ending January 15, 2001, Ms. Kayzer is entitled to receive one week of permanent partial general disability benefits at $334.74 per week, or $334.74, for a seven percent permanent partial general disability.

For the period from January 16, 2001, through August 31, 2001, Ms. Kayzer is entitled to receive 32.57 weeks of permanent partial general disability benefits at $334.74 per week, or $10,902.48, for a 60 percent permanent partial general disability.

For the period commencing September 1, 2001, Ms. Kayzer is entitled to receive 66.03 weeks of permanent partial general disability benefits at $334.74 per week, or $22,102.88, for a 24 percent permanent partial general disability, making a total award of $33,340.10, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Russell B. Cranmer, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation